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Interpretive Opinion/No Action Position
Adopting NASAA Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments

The Securities Division of the Maryland Attorney General's Office (the Securities Division) is issuing this interpretive opinion/no action position regarding the use of questionnaires and acknowledgments in franchise offerings.

Background

The Maryland Franchise Registration and Disclosure Law, MD. CODE ANN. BUS. REG. §14-201 et seq. (2015 Repl. Vol.) ("Maryland Franchise Law"), Section 14-226 states "As a condition of the sale of a franchise, a franchisor may not require a prospective franchisee to agree to a release, assignment, novation, waiver, or estoppel that would relieve a person from liability under this subtitle" ("Maryland Anti-Waiver Provision").

In applications for registration filed with the Securities Division, franchisors routinely include standard franchise agreements that contain language that may violate the Maryland Anti-Waiver Provision. That language is often found in "acknowledgments" in those franchise agreements ("Acknowledgments") although the language may appear in other materials. Many franchisors also include copies of questionnaires that they require prospective franchisees to execute ("Questionnaires") as a condition of entering into a franchise agreement, and those Questionnaires also often include language that may violate the Maryland Anti-Waiver Provision.

For the past several years, Securities Division examiners have required franchisors to include a legend in franchise offering materials, including Questionnaires and Acknowledgments, to address the concern that those materials may violate the Maryland Anti-Waiver Provision. That legend states that "all representations requiring prospective franchisees to assent to a release, estoppel or waiver of liability are not intended to nor shall they act as a release, estoppel or waiver of any liability incurred under the Maryland Franchise Registration and Disclosure Law." The Securities Division allows a franchisor to include this legend in a Maryland Addenda to their franchise offering, if the franchisor's offering materials are designed to be used in multiple states.

On September 18, 2022, the North American Securities Administrators Association, Inc. ("NASAA") adopted a Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments ("NASAA SOP"). The NASAA SOP sets standards for the proper use of Questionnaires and Acknowledgments in franchise offerings in states with anti-waiver provisions in their franchise laws. The NASAA SOP has an effective date of January 1, 2023.

The NASAA SOP prohibits franchisors from requiring a prospective franchisee to make any statement in any Questionnaires, Acknowledgments, or similar documents that: (i) is “subjective or unreasonable”; (ii) would cause a prospective franchisee to surrender or believe they have surrendered rights to which they are entitled under federal or state law; (iii) would shift a franchisor’s disclosure duties under federal or state law to the prospective franchisee; or (iv) includes prohibited or similar statements.

The NASAA SOP also requires that franchisors include in their Franchise Disclosure Document (“FDD”) and franchise agreements, or applicable state specific addenda to the FDD and franchise agreement, the following legend language:

No statement, questionnaire, or acknowledgment signed or agreed to by a franchisee in connection with the commencement of the franchise relationship shall have the effect of (i) waiving any claims under any applicable state franchise law, including fraud in the inducement, or (ii) disclaiming reliance on any statement made by any franchisor, franchise seller, or other person acting on behalf of the franchisor. This provision supersedes any other term of any document executed in connection with the franchise.

In the Background portion of the NASAA SOP, NASAA notes that some franchisors have successfully used Questionnaires, Acknowledgments, and other forms of contractually required disclaimers to insulate themselves from potential liability by franchisees alleging fraud or misrepresentations in the offer and sale of a franchise. The NASAA SOP refers to Questionnaires and Acknowledgments as “powerful defense mechanisms that franchisors can use to defeat claims of fraud and misrepresentation,” which can allow “unscrupulous franchisors to avoid the consequences of franchise fraud.”

The Securities Commissioner finds good cause to follow the NASAA SOP. The NASAA SOP provides a uniform approach to review of franchise offering materials for compliance under state’s anti-waiver provisions, including the Maryland Anti-Waiver Provision. The legend required by the NASAA SOP is not inconsistent with the legend that the Securities Division currently requires franchisors to include in franchise offering materials to address concerns that those materials may violate the Maryland Anti-Waiver Provision. Therefore, adopting the NASAA SOP promotes greater uniformity with other state’s franchise disclosure requirements. The Statement of Policy is consistent with the purposes of the Maryland Franchise Law and is in the public interest and appropriate for the protection of prospective franchisees.

Franchisors are responsible to ensure the Questionnaires, Acknowledgments, and other forms of contractually required disclaimers included with the franchise agreements and franchise disclosure documents comply with the NASAA SOP. When franchisors file applications for registration under the Maryland Franchise Law with franchise offering materials that violate the NASAA SOP, Securities Division examiners will comment on those materials consistent with the NASAA SOP.

Interpretive Opinion

Based on the foregoing, and under the authority granted under Section 14-209 of the Maryland Franchise Law and COMAR 02.02.08.13B(1), the Securities Commissioner has determined that, effective January 30, 2023, the Securities Division will follow NASAA's Statement of Policy Regarding the Use of Franchise Questionnaires and Acknowledgments. The provisions of NASAA SOP, attached as Exhibit A, are hereby incorporated by reference.

No Action Position

While a franchisor that is registered under the Maryland Franchise Law may file a post-Effective amendment to conform to the NASAA SOP requirements, the Securities Division will not require the franchisor to cease making offers and sales of franchises and immediately file such an amendment if the franchisor complies with this No Action Position. Until the franchisor is required to renew its filing or otherwise file an amendment to its franchise registration, if the franchisor requires a prospective franchisee to sign a Questionnaire or make any Acknowledgments that are contrary to the NASAA SOP, the Securities Division will take no action to require the franchisor to file a post-Effective Amendment to conform its franchise offering materials to the NASAA SOP and will take no action to prohibit the franchisor from making offers and sales of its franchises that are otherwise made in compliance with the Maryland Franchise Law, provided that the franchisor:

- (a) includes the legend described in Section II (C) (3) of the NASAA SOP in accordance with the instructions of the NASAA SOP;
- (b) either deletes its Questionnaire and any Acknowledgments that are contrary to the NASAA SOP, or includes a statement that its Questionnaire and those specific Acknowledgments shall not apply to prospective franchisees who are Maryland residents or who seek to purchase a franchise located in Maryland; and
- (c) updates its offering materials to comply with the NASAA SOP in the next amendment or renewal, whichever occurs first, that the franchisor files with the Securities Division for that franchise offering.

Consistent with the instructions of the NASAA SOP, the franchisor may make the above changes in its FDD and franchise agreement or in state-specific addenda applicable to both documents. For questions regarding this Interpretive Opinion/No Action Position, please contact Senior Assistant Attorney General Tade Osikomaiya at tosikomaiya@oag.state.md.us.

Dated: January 23, 2023

Melanie Senter Lubin
Securities Commissioner